No. 94-562

In The

Supreme Court of the United States

October Term, 1994

LESLIE WILTON, ON BEHALF OF HIMSELF AND AS A REPRESENTATIVE OF CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, AND CERTAIN INSTITUTE OF LONDON UNDERWRITERS COMPANIES, AS FOLLOWS, THE ORION INSURANCE COMPANY, PLC, SKANDIA U.K. INSURANCE PLC, THE YASUDA FIRE & MARINE INSURANCE COMPANY OF EUROPE, LTD., OCEAN MARINE INSURANCE CO., LTD., YORKSHIRE INSURANCE CO., LTD., MINSTER INSURANCE CO., LTD., PRUDENTIAL ASSURANCE CO., LTD., PEARL ASSURANCE PLC, BISHOPSGATE INSURANCE LTD., HANSA MARINE INS. CO. (UK) LTD., VESTA (UK) INS. CO., LTD., NORTHERN ASSURANCE CO., LTD., CORNHILL INSURANCE CO., LTD., SIRIUS INSURANCE CO. (UK) LTD., SOVEREIGN MARINE & GENERAL INSURANCE CO., TOKIO MARINE & FIRE INSURANCE (UK) LTD., TAISHO MARINE & FIRE INSURANCE CO. (UK) LTD., STOREBRAND INSURANCE CO. (UK) LTD., ATLANTIC MUTUAL INSURANCE CO., ALLIANZ INTERNATIONAL INSURANCE CO., LTD., AND WAUSAU INSURANCE CO. (UK) LTD.,

versus

Petitioners,

SEVEN FALLS COMPANY, MARGARET HUNT HILL, ESTATE OF A. G. HILL, LYDA HILL, ALINDA H. WIKERT, AND U.S. FINANCIAL CORP.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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Petitioners ("Underwriters") respectfully pray that the Court will reverse the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on June 29, 1994, and order the United States District Court for the Southern District of Texas, Houston Division, to proceed to trial on the merits.

REPLY ARGUMENT

I. The Hills Confuse Discretion to Grant Relief on the Merits with Discretion to Deny Proper Federal Plaintiffs their Forum at the Jurisdictional Threshold.

The issues of discretion to abstain and discretion to grant declaratory relief are separate. To the Hills they are the same and are governed by the same considerations; if a court enjoys wide discretion to grant relief, surely, the Hills maintain, it enjoys the same wide discretion to abstain from hearing the case in the first instance. The Hills' argument, however, fundamentally misperceives this Court's prior rulings in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 20-21 & n.23 (1983), and *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 126-27 (1968).

The prime example of the misperception their Brief fosters is the Hills' substitution of the word "jurisdiction" for the italicized portion of the following quote from Professors Wright, Miller and Kane: "In the early days of the Declaratory Judgment Act there was some thought that its terms were mandatory and did not leave any discretion in the court to refuse *to give declaratory relief*." 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, FEDERAL PRACTICE AND PROCEDURE § 2759 at 644 (2d ed. 1983 & Supp. 1993) (emphasis added). It appears that the Hills not only confuse nondiscretionary jurisdiction under 28 U.S.C. § 1332 with discretion to grant declaratory relief on the merits under 28 U.S.C. § 2201(a), but also seek to change leading commentators' views to suit the Hills' purposes. Except for the Fifth Circuit, even those circuit authorities in favor of broad federal court discretion to abstain under *Colorado River*,

nowhere contradict the concepts that review should be searching (if not *de novo*), and that an established test (if not *per se* the set of six *Colorado River-Moses H. Cone* factors) must be available to guide the discretion of district courts under *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942).

Since the considerations listed over fifty years ago in *Brillhart* have proven inadequate for the plethora of situations in which such questions arise, that basic starting point should be expanded to include the other factors relevant to most abstention decisions, just as the *Brillhart* Court anticipated it would. Transforming the fact-specific *Brillhart* considerations into factors to be weighed in the abstention equation applicable to most, if not all, declaratory judgment cases, does not require the straight-jacketing of district court discretion the Hills insist it would. Underwriters believe that guidelines based upon *Colorado River* and *Moses H. Cone*, and the additional considerations Underwriters have suggested, not only are workable, but will streamline judicial administration. Justice will certainly be served by replacing district courts' compassless, indiscriminate recitation of conclusional "findings" with firm guidelines for exactly what elements constitute valid grounds to defer to a parallel suit. A careful balancing of those factors, "heavily weighted in favor of the exercise of jurisdiction," will ensure that dismissals or stays of declaratory judgment actions are "the exception, not the rule." *Moses H. Cone*, 460 U.S. at 16; *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 812-13 (1976).

By treating *Provident Tradesmens* as having the same holding as *Brillhart*, the Hills further betray their fundamental misapprehension of the jurisdictional question to abstain. Directly contrary to the Hills' characterization, the holding in *Provident Tradesmens* instead is that there is no reason to delay indefinitely a federal plaintiff's declaratory relief pending decision of another suit in which the issue admittedly could be litigated. Concurrent jurisdiction naturally involves this sort of federal decision of state law, and occasionally, if not frequently, of dispositive fact questions. This possibility of collateral estoppel does not militate in favor of declining

jurisdiction over a proper declaratory judgment action, but instead may influence the grant of relief or how such declaration of rights is crafted. *Provident Tradesmens*, 390 U.S. at 126.

Even in affirming the stay in *Kerotest Manufacturing*, the Court emphasized that the wise administration of judicial resources was to be based on a balancing of all the equitable factors, rather than automatically preferring one party's patent-infringement action over another party's later-filed declaratory judgment action regarding patent validity. Reliance was placed on the comprehensive evaluation by the appellate court, on two occasions, that the more effective relief in that case was available in the parallel forum, rather than on some mechanical jurisdictional abstention test. *Kerotest Mfg. Co. v. C-O Two Fire Equipment Co.*, 342 U.S. 180, 183-84 (1952). *See also Cardinal Chem. Co. v. Morton Intern., Inc.*, ___ U.S. ___, 113 S.Ct. 1967, 1976-77, 124 L.Ed.2d 1, 16 (1993).

The Federal Circuit practice reviewed in the recent *Cardinal Chemical* case would determine as moot any declaratory judgment action on patent validity, when a parallel or counterclaim action determined the issue of infringement so as to extinguish the "controversy" providing federal jurisdiction. *Cardinal Chemical*, ___ U.S. at ___, 113 S.Ct. at 1971, 124 L.Ed.2d at 10. This Court determined that there was no *per se* jurisprudential basis to abstain, because a "company once charged with infringement must remain concerned about the risk of similar charges if it develops and markets similar products in the future." *Id.* at 1976-77, 124 L.Ed.2d at 16.

In requiring dismissal, the Federal Circuit had adopted the sort of presumptive abstention practice the Hills advocate here.[1] This Court, in acknowledging the possibility of cases

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[1] While they linguistically sidestep (Resp. Brief 24 & n.10 and their earlier Brief of Defendants/Appellees 9 n.7 to the court below) the *de facto* presumption they have previously advocated, the practical effect of the Hills' position is still that the declaratory judgment plaintiff must overcome some burden that "[a]bsent a strong countervailing federal interest, the federal court should not elbow its way

where declaratory relief would serve no beneficial purpose after a noninfringement finding, authorized the Federal Circuit and the lower courts to abstain where the "factors in an ***unusual case*** might justify that Court's refusal to reach the merits of a validity determination – a determination which it might therefore be appropriate to vacate. A finding of noninfringement alone, however, does not justify such a result." *Id.* at 1978, 124 L.Ed.2d at 18 (emphasis added).

The Hills also entirely misstate the language of *Public Service Commission v. Wycoff Co.*, quoted at Resp. Brief 14. Underwriters contend that the Hills' mischaracterization does the Court's opinion considerable violence. While *Wycoff* discussed the declaratory judgment plaintiff asserting what amounts to a defense of an anticipated state court action, that discussion was related to the well-pleaded-complaint rule for federal-question jurisdiction rather than to any connection to, or impact upon the appropriateness of, the declaratory judgment remedy.[2] As diversity is unchallenged in this case, the cited portions of *Wycoff* are irrelevant. Resp. Brief 7 & 14. Additionally, as a matter of policy, there is no concern in this diversity case that the Declaratory Judgment Act is being misused to bring into federal court a dispute that otherwise could not be heard.[3]

Wycoff's ripeness discussion is important because it intimates that *any* case that is not too conjectural for adjudication

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into this controversy." Resp. Brief 17. Underwriters respectfully submit that although the term presumption has now been abandoned by the Hills, *Colorado River* forbids such practice and that the principles of even *Brillhart* are violated. However, the Hills also can not deny that they quoted for the district court below (J.A. 18; RII 113) the presumptive language from *Continental Cas. Co. v. Robsac Indus.*, 947 F.2d 1367, 1370-71 (CA9 1991).

[2] *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 243 (1952).

[3] Indeed, the Hills' damages action could just as easily have been filed at first instance in federal court if they did not persist in joining in it the unrelated claims of third parties in order to defeat diversity. If Underwriters' motion to sever is eventually granted by the Harris County court to which the state action has been transferred, removal may in fact bring this litigation back into the Southern District of Texas. A similar possibility in *Provident Tradesmens* was a cogent reason to decline abstention in that case. *Provident Tradesmens*, 390 U.S. at 126-27.

is appropriate for a declaratory judgment. While the dispute in *Wycoff* was not clearly defined and essentially not ripe, all the Court said about the Declaratory Judgment Act was that Congress could not have intended to make justiciable a conjectural question not otherwise a case or controversy within the meaning of Article III.

II. The Hills Treat Nondiscretionary Diversity Jurisdiction Differently When Suit is under the Declaratory Judgment Act.

The separation-of-powers concerns discussed in *Wycoff*, and recently in *New Orleans Public Service, Inc.*, indicate that great reticence to abstain is appropriate where the rationale does not include deference to special state administrative procedures. *New Orleans Public Service, Inc. v. New Orleans*, 491 U.S. 350, 363-64 & 368-69 (1989). This coverage dispute certainly does not involve any administrative mechanism and does not even implicate important matters of state policy.

Discretion to grant or to deny declaratory relief on the merits should not become a court-created, congressionally-unenacted special jurisdictional exception to 28 U.S.C. § 1332. Because Congress expressly intended insurers[4] and other proper federal litigants to have available the beneficial remedy of a declaratory judgment,[5] the court-made constraints on entertaining suit must be carefully administered.[6]

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[4] *Hearings on H.R. 5623 Before a Subcomm. of the Senate Comm. on the Judiciary*, 70th Cong., 1st Sess. at 46-59 (1928) (specifically listing insurance policies as one of the prime documents whose contract interpretation in a neutral federal forum the declaratory judgment mechanism was intended to facilitate). *See also* 10A Wright, *et al.*, Federal Practice and Procedure § 2760 at 658-69.

[5] S. Rep. No. 1005, 73d Cong., 2d Sess. at 3-4 (1934); H.R. Rep. No. 1264, 73d Cong., 2d Sess. at 2 (1934); H.R. Rep. No. 627, 72d Cong., 1st Sess. at 2 (1932).

[6] Because neither a regulation of commerce nor a policy of marine insurance is involved, Underwriters can not avail themselves on the facts existing in this particular insurance dispute of the very strong separation-of-powers arguments made by the Maritime Law Association on the abridgment of constitutionally vested admiralty jurisdiction affected by any unenacted exception to jurisdiction

Particularly because only a prudential concern for wise judicial administration is implicated in this case, avoiding congressionally mandated jurisdiction is warranted only in the "exceptional circumstances" delineated in *Colorado River* and its progeny. *Youell v. Exxon Corp.*, No. 94-7691, 1995 U.S. App. Lexis 3625 *29-30, 1995 WL 73750 *9-10 (CA2 Feb. 21, 1995).

As *amicus curiae* Insurance Environmental Litigation Association emphasizes, the judiciary must maintain a proper focus on the statutory bases of diversity jurisdiction, and on Congress' refusal to restrict it as far as some advocates urge and some judges feel is appropriate. Significant guidance is gained by examining the review of lower court jurisdictional abuses set right in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 344 (1976) and *Northbrook National Insurance Co. v. Brewer*, 493 U.S. 6, 11-12 (1989).

Underwriters recognize that removal principles and remand decisions under 28 U.S.C. § 1441 are quite different from the issues regarding the dismissal or stay of a declaratory judgment action in favor of a parallel state court suit. However, the separation-of-powers issues are identical with those concerning 28 U.S.C. § 2201(a). *Compare New Orleans Public Service, Inc.*, 491 U.S. at 368-69 *with Brewer*, 493 U.S. at 11-12.

Brewer and earlier cases restricted "prudential" bases for declining jurisdiction, while later opinions emphasized that *Thermtron Products* recognized grave constitutional implications in denying a federal forum to a proper litigant "for the amorphous reasons of 'economy, convenience, fairness, and comity' that may seem justifiable to the majority but that

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over declaratory judgment actions brought pursuant to Fed. R. Civ. P. 9(h), 28 U.S.C. §§ 1331, 1333 & 1337. Brief of *Amicus Curiae* 13-17. Nonetheless, Underwriters specifically draw the Court's attention thereto, because the rule the Hills advance has even more sweeping implications for maritime commerce and marine interests than the erroneous Fifth Circuit law *amicus* attacks as already having had on admiralty and maritime cases.

have not been recognized by Congress."[7] However, the Hills invite this Court to make just such a judicial revision to 28 U.S.C. § 1332 for any declaratory judgment action which is met with a later-filed parallel proceeding in state court. Addressing *amicus*' congressionally-conferred-jurisdiction argument, the Hills invoke Congress' "power to restrict diversity jurisdiction [which . . .] it effectively has done so by vesting the district courts with discretionary jurisdiction in declaratory judgment actions." Resp. Brief 18 n.7.

This is an even more extreme position than the presumption in favor of abstention the Hills have up to now advocated; for the Hills now assert revocation or amendment of the diversity statute by implication from the sixty-year-old enactment of a non-jurisdictional statute. Not only is the Declaratory Judgment Act merely a procedural remedy, but the legislative history of 28 U.S.C. § 2201 is also virtually silent with regard to jurisdiction. *See Hearings on H.R. 5623 Before a Subcomm. of the Senate Comm. on the Judiciary*, 70th Cong., 1st Sess. at 4 (1928).

III. "Natural Plaintiff" Status Does Not Make Insureds Forever the Masters of Coverage Litigation.

Equally unsettling as their arguments for a presumption against retaining a declaratory judgment action and for an unenacted exception to diversity jurisdiction, much of the Hills' abstention analysis has a peculiar preoccupation with their status as aggrieved insureds entitled to dictate the time, place, manner, pace, scope, and virtually the outcome of any coverage dispute. Fearful of overstating the Hills' position and intentions, Underwriters must resolutely show the facts behind the filing of the "piecemeal" litigation and the legal and equitable issues involved in the closing of the federal courthouse doors which the Hills have thus far achieved.

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[7] *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 361 (1988) (White, J., dissenting); *accord Gibson v. Berryhill*, 411 U.S. 564, 581 (1973) (stating that equity, comity, and federalism did not preclude injunction nor require abstention pending state prosecutions).

As most clearly revealed by their out-of-context construction of *Wycoff*, 344 U.S. at 248, the Hills' chief complaint is that Underwriters' declaratory judgment action too effectively presents the issue dispositive of this coverage dispute, and does so in a posture favorable to Underwriters. Resp. Brief 14. The Hills make no secret of their preference for litigating with "foreign insurers" in state court. They unabashedly admitted it to the court below.[8]

The Hills' position advances a policy requiring the district court merely to evaluate whether a declaratory judgment defendant is more naturally aligned as a plaintiff, and, if so, then it categorically deserves its indisputable choice of forum – whether it filed before the federal action or after. This is directly contrary to this Court's pronouncement in *Haworth*: "[T]he character of the controversy and of the issue to be determined is essentially the same whether it is presented by the insured or by the insurer."[9]

The Hills' improper emphasis on the claimant as "natural plaintiff" effectively denies insurers the ability ever to put "the ball into play." As this coverage dispute was not speculative from denial of defense July 31, 1992, Underwriters should not have been constrained forever to await the Hills' determination that they were finally ready to resolve this matter. RII 268 Transcript pp. 19-20. Even after the commencement of this declaratory judgment action, the Hills disavowed any intention to renew their indemnity demand for the time being, and convinced Underwriters to dismiss the action filed December 9, 1992. Only after being sued by another set

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[8] RI 170; *see also* Resp. Brief 34-35 n.16 ("preemptive" federal action "in an effort to deprive their insureds of a state court forum" is the forum shopping of which the Hills complain). This position is categorically at odds with pronouncements from this Court that the choice within one jurisdiction between federal and state fora can not implicate forum shopping, as the Hills betray they knew in trying to bring their state court suit against Underwriters in the improper venue of Travis County.

[9] *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 244 (1937). *See also Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace*, 288 U.S. 249, 261 (1933).

of insurers did the Hills determine the time was "ripe" to litigate this coverage dispute.[10]

A. Too Broad a Jurisdictional Discretion.

If the forum choice of the "natural plaintiffs" is entitled to presumptive preference, the Hills' reasoning goes, piecemeal litigation created by the after-filed state court suit implicates a waste of judicial resources; in paramount circularity, abstention is accordingly proper to avoid duplicative litigation created by the party complaining of waste. Patently, Underwriters' suit would not have been duplicative had the Hills not brought their suit in Travis County. And while a declaratory judgment will not lie simply to anticipate a defense or to establish liability in a vacuum,[11] both in the patent and insurance contexts the declaratory judgment is almost always sought to settle a questioned liability.[12] This practice has been unquestioned for nearly sixty years, so there is no reason why the *Colorado River* test for extraordinary circumstances in which a federal court may decline its jurisdiction should not apply as fully to declaratory judgment actions as to all other law suits brought in federal court. *Public Affairs Assocs. v. Rickover*, 369 U.S. 111, 117 (1962) (Douglas, J., concurring).

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[10] Resp. Brief 4 ("In light of the fact that the Hill Group's negotiations with their other insurers had fallen through and [those carriers instituted their own declaratory judgment] litigation, the Hill Group saw no point in further postponing resolution of all of their insurance coverage questions with all of their insurers."). The Hills omit that they instituted a Dallas County action against the *Pateman* parties in the 116th District Court in February 1993 and then in March 1993 haled Underwriters before a fourth court, the 299th Judicial District, Travis County, after both this declaratory judgment action had been refiled and the *Pateman* parties had a pending declaratory judgment action in the 298th Judicial District, Dallas County. RI 152-83, 193-98, 204 ¶ 7, 205 ¶ 3; RII 120-37, 139-44, 150 ¶¶ 3 & 5, 152-83, 204 ¶ 7, 224.

[11] *Green v. Mansour*, 474 U.S. 64, 72-74 (1985); *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49, 60 (1987).

[12] 10A Wright, *et al.*, Federal Practice and Procedure §§ 2760-61 at 658-90; 6 Donald S. Chisum, Patents § 21.02[1] at 35-91 (1990) & 5-16 (Supp. 1994).

Denying jurisdiction on the basis of wise judicial administration, which lacks Article III overtones, has always been of much greater gravity than ripeness, mootness, and other procedural rules fashioned to control district courts' dockets. The convenience of the federal courts is entirely irrelevant, but nonetheless, virtually unfettered district court discretion abolishes both the right and remedy to proceed in federal court if a congested docket favors shunting the matter to the state court system, or in simply denying the determinability of the issues as was the practice reviewed in *Cardinal Chemical*.

A comparison with *Cardinal Chemical* is again instructive. Because fact-specific patent infringement is a discrete question and because "the validity issues were generally more difficult and time-consuming to resolve, the interest in the efficient management of the Court's docket might support" a rule that infringement questions should be resolved before passing on the patent's validity. *Cardinal Chemical*, ___ U.S. at ___, 113 S.Ct. at 1976, 124 L.Ed.2d at 16. However, the same considerations favoring infringement to be declared before addressing patent validity lent no support for the drastic practice under review in *Cardinal Chemical, i.e.*, dismissing an alleged infringer's declaratory judgment action (or actually vacating one granted on the merits of validity), whenever the owner of the ostensibly valid patent lost an infringement counterclaim or parallel damages suit. *Id.* As discussed above, the right of the alleged infringer to obtain a declaratory judgment on the course of contemplated conduct, as well as existing uses, should not be made to wait on the patentee's decision to file another action. *Id.* at 1976-77, 124 L.Ed.2d at 17. Because of its interests in a final determination and other countervailing concerns, a proper federal litigant could not be so lightly discharged from the federal courthouse. *Id.*

The Hills argue that, like *Cardinal Chemical's* review, current Fifth Circuit procedure is adequate to ensure that a district court does not abstain for clearly inappropriate reasons like individual bias. Resp. Brief 22-24 & n.8. Underwriters' point is not that a judge's bias against a particular litigant would escape appellate review for an abuse of discretion, but that the Fifth Circuit's

perfunctory review will rarely, if ever, provide redress when the district court's decision is phrased in virtually meaningless findings of piecemeal litigation and a race to the courthouse.[13] Every litigant who files a second suit in state court will always perceive that it was the victim of a race to the courthouse and can always argue that maintenance of separate law suits will be duplicative and wasteful.

Describing a "rule of obeisance" as unhealthy, Judge Friendly of the Second Circuit recognized that "in these days of crowded dockets there is an inevitable risk of some degree of subconscious bias when decision whether to dismiss a case because of *forum non conveniens* is made by the judge who will have to try it if the motion is denied." Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 754 (1982). Nonetheless, such disinclination has rendered a proper declaratory judgment action merely an invitation to file a state court suit that permissively will be given preference, if not outright presumptive priority.[14] In the face of busy dockets, the federal courts are routinely abdicating their responsibility to resolve

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[13] Though the *Thermtron Products* dissent implied misconduct by the district court, Underwriters here do not contend that the district courts merely "dress up" capricious rulings in language fitting applicable abstention analysis. *Thermtron Prods.*, 423 U.S. at 361 & unnumbered note (Rehnquist, J., dissenting). Rather, the district courts' congested dockets and other issues involving the courts' disinclination to hear complex commercial matters provide no foundation for a door-closing practice that deprives legitimate federal parties their choice of forum. Just as the *Thermtron Products* district court believed the interests of justice were served by the (improper) remand to the state court, and that the efficiency of its docket was also advanced, Underwriters do not challenge that the court below honestly believed abstention was appropriate. Because of the district court's faulty analysis, however, each of its findings was erroneous on the sparse evidence presented by the Hills.

[14] Although the Hills reference Professor Michael T. Gibson's article in support of their position, they did exactly what he criticizes: "The 'lack of progress' factor, the laudable goal of which is to protect a court that has invested substantial time in a case, instead invites abuse [. . . and] invites a wily attorney whose client is sued in federal court merely to file immediately a countersuit in state court, along with a motion to dismiss in federal court." Michael T. Gibson, *Private Concurrent Litigation in Light of Younger, Pennzoil, and Colorado River*, 14 OKLA. CITY U. L. REV. 185, 202, 14 WL OKCULR 185 p. 23 (1989) (*cited in* Resp. Brief 12).

issues that are within the concurrent jurisdiction of state courts.[15] Nothing distinguishes insurers' actions for declaratory relief from *forum non conveniens* and removal considerations regarding a district court's disinclination to entertain a class of litigation. Because insurers' declaratory judgment actions are usually complex cases in federal courts' already overburdened dockets, institutional rules are necessary to restrain a self-motivated exercise of discretion. It should be no more permissible to reject a declaratory judgment case where jurisdiction is clearly valid, than to remand a properly removed action because "there is no available time in which to try the above-styled action in the foreseeable future. . . . " *Thermtron Prods.*, 423 U.S. at 339. Even where the purposes of abstention are heightened, as in passing upon untried state penal statutes, deference to the state court is restricted to "narrowly limited 'special circumstances,' " not the nearly complete discretion the Hills misperceive in *Brillhart. Zwickler v. Koota*, 389 U.S. 241, 248 (1967); *Moses H. Cone*, 460 U.S. at 13-16.

B. Disinclination to Entertain Actions for Declaratory Relief.

Some of the increase in declaratory judgment abstentions is attributable to more dismissals and stays simply being requested, where previously litigants just resigned themselves to remaining in the federal forum. However, the receptivity of judges may also be the reason that the practice has caught on to file a parallel case and then move to stay the federal declaratory judgment proceeding. The more receptive a hearing these motions receive, the more popular they were destined to become.

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[15] *Thermtron Products* curtails this practice with regard to the decision to remand when the district court perceives that its heavy docket might "unjustly delay plaintiffs in going to trial on the merits of their action. This consideration, however, is plainly irrelevant to whether the District Court would have had jurisdiction of the case had it been filed initially in that court, to the removability of a case from the state court under [28 U.S.C.] § 1441, and hence to the question whether this cause was [properly remanded]." *Thermtron Prods.*, 423 U.S. at 344.

Speaking generally on *Colorado River*, not just as invoked in declaratory judgment cases, another of the Hills' cited commentators made just this point. While it is true that Mr. Davis notes "that the goal of *Colorado River* is wise judicial administration" (Resp. Brief 12), he also argued that even though *Colorado River* and *Moses H. Cone* "cautioned against overuse of the new abstention doctrine, federal courts applied the imprecise standard liberally, and often inappropriately, perhaps because of burgeoning dockets. . . . Too many times, a federal claimant's right to litigate in federal court has been denied because of a district court's manipulation of the vague test set out in those cases."[16]

Underwriters believe that the federal courts' disposition to avoid declaratory judgment cases chiefly on the basis of the courts' convenience is suggested by a 1992 Federal Judicial Center poll of active and senior district court judges on a whole range of "jurisdictional" proposals from raising the amount-in-controversy requirement to abolishing diversity jurisdiction entirely. More than half of the active district judges either strongly (29.1%) or moderately (21.4%) supported the proposition that federal courts should enjoy "discretionary jurisdiction in civil cases that may not warrant a federal forum." Federal Judicial Center, *Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges* Q.3.08 at 29 (1994). If the majority of federal judges have a predisposition for this type of abstention and are less than enthusiastic (50.5% strongly or moderately) about hearing cases "that may not warrant a federal forum," is it any wonder that abstentions from declaratory judgment actions are increasing?

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[16] Howard A. Davis, *Slowing the Flow of Colorado River: The Doctrine of Abstention to Promote Judicial Administration*, 77 ILL. B.J. 648, 648-49 (1989) (reprinted verbatim at 33 TRIAL LAW. GUIDE 564 (1990), which Resp. Brief 12 cites).

IV. A "Needless" Determination of State Law is Not Implicated.

Application of only state law to a controversy is another of the Hills' rationales for this abdication of proper jurisdiction where the district court is of the opinion that the declaratory judgment action "may not warrant a federal forum." Federal courts routinely decide matters under state law, so that a state-law rule of decision "rarely" indicates that a state court should be allowed to decide a case, and then only on matters of public policy concern. The adjudication of even unsettled state law is – alone – never enough to warrant a federal court's abstention. *Moses H. Cone*, 460 U.S. at 25-26 & n.33. Even when the federal adjudication will establish an issue of first impression under state law, abstention is not thereby required;[17] only if the totality of the circumstances indicate that the state court more effectively can resolve the dispute between the parties should the federal litigant be deprived of a neutral federal forum's declaration of what the state courts would do on a particular issue of state law.

One of the Third Circuit *Pullman* cases the Hills cite plainly holds: "Simple contract and tort actions that happen to involve an insolvent insurance company are not matters of important state regulatory concern or complex state interests." *Grode v. Mutual Fire, Marine & Inland Ins. Co.*, 8 F.3d 953, 959 (CA3 1993). If the presence of a state receiver and "complex regulations relating to insolvent insurance companies" did not justify the district court's abstention in *Grode*

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[17] *Provident Tradesmens*, 390 U.S. at 126-27 (preempting the underlying tort suits, on the attendant factual determination of entrustment, did not justify denying a coverage determination of "permission" under the automobile policy; reversing the *en banc* appellate court's incorrect "dismissal as an unwarranted intrusion upon state adjudication of state law"). Certification of a truly important question of state law is also authorized under Tex. R. App. P. 114(a), though Underwriters note that neither this nor similar procedures are available "as a convenient way to duck [the court's] responsibility in OCSLA or diversity jurisdiction," to determine difficult state law questions. *Transcontinental Gas Pipeline Corp. v. Transportation Ins. Co.*, 958 F.2d 622, 623-24 (CA5 1992). *See generally* Note, *Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals,"* 73 YALE L.J. 850 (1964).

under any of the four abstention doctrines, certainly mere insurance contract interpretation requested in this case under Texas law falls short of the "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result" as between the parties. *Colorado River*, 424 U.S. at 814. Only unsettled principles of state law bearing upon public policy issues should not be "needlessly" interfered with, so Underwriters suggest that all the Hills' protestations are misplaced on the need for state adjudication of this case's insurance questions.

V. To the Extent Texas Insurance Law is Relevant to the Abstention Considerations in this Case, the Hills Misstate the Applicable Principles and the Lessons to be Drawn.

The Hills first make a convoluted realignment-mootness argument that because the dispute has now ripened into a full-blown contract claim, Underwriters' request for declaratory relief is moot, and contractual determination of damages on their "ripened breach of contract counterclaim," "to address an actual wrong already committed," is such that the Hills would "for all practical purposes, be pursuing duplicative, piecemeal claims as a plaintiff both in this action and in the state court action." Resp. Brief 37-38. However, neither of the two Northern District of Texas cases the Hills cite[18] have any

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[18] *Navistar Intern. Corp. v. Emery*, 643 F. Supp. 515, 517 (N.D. Tex. 1986); *Dresser Indus., Inc. v. Insurance Co. of North Am.*, 358 F. Supp. 327, 330 (N.D. Tex.), *aff'd*, 475 F.2d 1402 (CA5 1973) (table). The latter case, which pre-dates *Colorado River*, is simply irrelevant. The former decision to dismiss a contract declaratory judgment action brought by the alleged party in breach, was premised on the more comprehensive nature of the trucking company's state court suit for "antitrust violations under Texas law, breach of contract, tortious interference with contract, and conspiracy" with third parties. As the parallel federal and state actions were filed the same day, there was no discussion of the "ripening" of the breach-of-contract claim "mooting" the right to a determination whether a valid contract bound the parties. *Navistar*, 643 F. Supp. at 516-17. The prescriptive discussion in *Navistar* concerned whether to stay the federal declaratory judgment proceeding pending resolution of the other suit, or to dismiss the federal action outright. The

suggestion of realignment of parties, nor do they, or any Texas authority of which Underwriters are aware, stand for the proposition that a "ripened" contract claim moots a declaratory judgment request for an interpretation of an allegedly breached contract as "an actual wrong already committed."[19]

The outright disingenuousness of the Hills' argument is betrayed by the course of proceedings on the other insurers' declaratory judgment action filed in the 298th Judicial District, Dallas County, long after these Underwriters filed their original federal suit. Upon service of the *Pateman* petition February 23, 1993, the Hills filed their own damages action in the 116th Judicial District,[20] substantively identical to the Travis County suit they would later file against Underwriters. Within a week of filing their separate suit and submitting an Injunction Hearing Brief to the 116th Judicial District Court, the Hills' damages and injunctive case was consolidated in the 298th Judicial District Court with the previously filed

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Navistar rationale was not that a "ripened" cause of action for breach of contract moots a request for a declaratory judgment concerning that contract, but that "under Texas law, a Texas state court cannot issue a declaratory judgment when a Federal Court has jurisdiction over the case, even when that Federal Court has stayed proceedings," allegedly because it would be rendering an advisory opinion. *Id.* at 517 (*citing United Services Life Ins. Co. v. Delaney*, 396 S.W.2d 855, 856 [859-63] (Tex. 1965), which Underwriters suggest is no longer good law). While nothing Underwriters know of Texas declaratory judgment practice then or now would prevent a court going forward on a breach-of-contract claim for damages when another venue was, or had been, asked to declare the validity of a contract, the principles involved are issue preclusion and *res judicata*. Until collateral estoppel adheres to a valid determination by judgment between the identical parties by a competent tribunal, nothing in Texas statutory or case law prevents a state court from entertaining breach-of-contract claims because of the pendency of a declaratory judgment action in federal court.

[19] *See BHP Petroleum Co., Inc. v. Millard*, 800 S.W.2d 838, 842 (Tex. 1990); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 37.004, Annotations 17-23, at 435-38 (Vernon 1986) & at 97 (Vernon Supp. 1995).

[20] *See* footnote 10, *supra* page 9, and footnotes 4-7 of the original Brief of Petitioners, pp. 4-6. The Hills also gave Underwriters notice of intent to file February 23, 1993, pursuant to the January 22, 1993 letter agreement with Underwriters. J.A. 4 & 24; RII 141 ¶ 1.

Pateman action, though the *Pateman* declaratory judgment action sought no monetary damages, invoked no legal claim or coercive remedy, and requested no injunctive or equitable relief. Appendix, *infra*, SA-1. As *Pateman* was – and is – no more than a request for declaratory relief, the Hills clearly are wrong that Texas practice requires that their breach-of-contract and other claims supplant a declaratory judgment action for construction of the same insurance contract.[21] If the Texas Supreme Court authority invoked by the Hills holds what the Hills here erroneously suggest it does, consolidation in the 298th Judicial District would not only have been inappropriate, it would have been impossible.

A corollary to the Hills' idea that "an actual wrong already committed" "ripens" so as to "moot" a request for declaratory relief is that Underwriters' declaratory judgment filing was "premature" because no judgment had been rendered by the Winkler County court at the time these Underwriters filed their action December 9, 1992. In supposed contrast to the other group of insurers the Hills have sued in Dallas County, Underwriters allegedly were so anxious to get off the starting line that they filed the original December 9, 1992 declaratory judgment action prematurely, before any coverage claim had ripened because of an adverse judgment, rather than just a jury verdict.[22]

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[21] *See* the Hills' Brief of Defendants/Appellees 5 & n.3 (*citing Abor v. Black*, 695 S.W.2d 564, 566 (Tex. 1985) ("Recognizing that the 298th Judicial District court lacked jurisdiction to hear the declaratory judgment action filed by the Hill Group's other insurers in light of the fact that the Hill Group had ripened breach of contract and other claims," the Hills filed a separate action originally lodged with the 116th Judicial District). But this second suit, the Hills are reticent to admit, was consolidated with the pending *Pateman* litigation in the 298th Judicial District Court, though that court supposedly lacked jurisdiction because the contract interpretation sought had allegedly "ripened" into an "actual wrong already committed."

[22] Resp. Brief 42 & nn. 21 & 22. The cited case itself holds that the declaratory judgment was fully justiciable on the issue of a duty to defend the husband. *Firemen's Ins. Co. v. Burch*, 442 S.W.2d 331, 332 (Tex. 1968). What was considered too hypothetical for a declaratory judgment was if the wife were held liable to the third party, could the third party claim against the husband, and in that event would the insurer be responsible for defense and indemnity of an action by

However, the Hills' argument raises the specter of no declaratory judgment ever being proper. Their argument is that until a judgment on the insured's liability has been entered, a coverage dispute is not "ripe"; once a judgment is entered on a verdict against the insured, denial of coverage is "an actual wrong already committed," so that the "ripened" claim should be brought as a breach-of-contract action by the putative aggrieved party, rather than as a declaratory judgment action by the alleged wrongdoer. The palpable fallacy in the Hills' conundrum needs no further refutation than the rejection of similar arguments by the Dallas County court in which the other insurance actions have been consolidated.

The Hills also contest Underwriters' point that summary judgment procedures under the Texas Rules of Civil Procedure make it doubtful whether even the straightforward contract interpretation of policy terms will be ruled upon by the Harris County court as a matter of law. Rather than to respond to Underwriters' argument that the practice in Texas is to allow all fact issues to go to the jury, even if policy interpretation is suitable for determination as a matter of law, the Hills merely recite that there is no procedural bar to submission of a summary judgment motion and that several cited (but unanalyzed) cases indicate that "Texas state courts do not hesitate to grant summary judgments to deserving insurers." Resp. Brief 48.

Underwriters too could offer an unhelpful list of all the Texas cases where summary judgments have been denied on account of an allegedly disputed issue of material fact. However, the point is not whether summary judgment would be granted by a federal court, but that the procedural rules of the state court treat insurance policy interpretation so as virtually to foreclose summary judgment. On that point, Underwriters would again direct the Court's attention to the authoritative discussion of how Texas practice differs from federal summary judgments in David Hittner, Lynne A. Liberato & Bruce

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the third party to collect from the vicariously liable husband. *Burch*, 442 S.W.2d at 333-35.

R. Ramage, SUMMARY JUDGMENTS AND DEFAULTS IN THE STATE COURTS OF TEXAS § I at 56-58 (1992).

Finally, Underwriters object strenuously to the Hills' canard that a legitimate concern for protecting trade secrets and financial information "is a revealing admission of London Underwriters' intentions regarding discovery." Resp. Brief 47. The point is that the federal courts are institutionally better equipped and structurally more effective at protecting the rights of foreign litigants; the advantage is identical to the issues concerning special admiralty-practice procedures raised by *amicus curiae* Maritime Law Association regarding the Supplemental Rules for Certain Admiralty and Maritime Claims and Fed. R. Civ. P. 4(k)(1)(B) & 9(h). This procedural advantage is complemented by a greater competence than displayed by state courts in following the United States' bilateral and international commitments with regard to transnational discovery and litigation; it also extends to greater overall sensitivity to comity and other concerns when international transactions are being adjudicated.

With regard to numerous procedural advantages and otherwise, Underwriters have established that the litigation with the Hills is better conducted in federal court. *See Brillhart*, 316 U.S. at 495 (the district court is required to "ascertain whether the questions in controversy . . . can ***better*** be settled in the proceeding pending in the state court"). Accordingly, it was an abuse of the district court's discretion to stay this cause in favor of an improper venue in which piecemeal litigation was deliberately created by the Hills.

VI. Standard of Review.

The Hills' final platitude is that "broad discretion does not equate to absolute discretion"; they assert that the Fifth Circuit's review was more than cursory. Resp. Brief 30-31. On the standard-of-review question presented in this case, any deference due a district court's abstention decision in *Younger* and *Pullman* contexts, Underwriters respectfully suggest, is not so great as the Hills imply; but in any event it would be more than in a declaratory judgment dismissal or stay because

wise judicial administration is a weaker foundation for abstention than deference to state determination of state public policy in the first instance. *Gordon v. Luksch*, 887 F.2d 496, 498 (CA4 1989) ("judicial diseconomy alone does not justify abstention"). While leaving to the Court's interpretation the appropriate scrutiny given on appeal to the decision to abstain under other doctrines, Underwriters do believe this Court's and the majority of circuits' review of *Younger*, *Pullman*, and *Burford* decisions is *de novo* or "plenary." *See Sheerbonnet, Ltd. v. American Express Bank Ltd.*, 17 F.3d 46, 48 (CA2), *cert. denied*, ___ U.S. ___, 115 S.Ct. 67, 130 L.Ed.2d 23 (1994); *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265, 269-70 (CA3 1991).

CONCLUSION

In the interests of justice, and for all the foregoing reasons and those Underwriters previously asserted, the Court should reverse the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, and order the United States District Court for the Southern District of Texas, Houston Division, to proceed to trial on the merits.

Respectfully submitted,

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NO. 93-1658-M
(Consolidated with No. 93-1929)

RONALD MALCOLM PATEMAN, et al.,	§	IN THE DISTRICT COURT
Plaintiffs,	§	
VS.	§	
MARGARET HUNT HILL, individually, et al.,	§	
Defendants.	§	DALLAS COUNTY, TEXAS
MARGARET HUNT HILL, et al.,	§	
Plaintiffs,	§	
VS.	§	
RONALD MALCOLM PATEMEN, et al.,	§	
Defendants.	§	298th JUDICIAL DISTRICT

ORDER OF CONSOLIDATION

On this date the Court considered the Order of Consolidation proposed by Margaret Hunt Hill, et al., Defendants in Cause No. 93-1658 and Plaintiffs in Cause No. 93-1929. The Court is of the opinion that the proposed Order is well taken and shall become an Order of this Court.

IT IS, THEREFORE, ORDERED that the case styled *Margaret Hunt Hill, et al. v. Highlands Insurance Company, et al.*, Cause No. 93-1929-F pending in the 116th District

Court is hereby transferred to this Court and consolidated with Cause No. 93-1658-M, entitled *Ronald Malcolm Pateman, et al. v. Margaret Hunt Hill, et al.*

[p. 2]

SIGNED this the 1 day of March, 1993.

/s/ _____
JUDGE PRESIDING